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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAC 6252

GLENN M. ANDERSON, LYLE COOK, JACK GOLDBERGER, ELINOR R. HELLER, JUNE B. JOYNER, S. A. MASTERSON, JULIA PORTER, NED REDDING, JAMES ROOSEVELT, AND LEE SANDERS,

Appellants,

vs.

FRANK M. JORDAN, AS SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Respondent

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION ON APPEAL

Pursuant to Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, appellants file this statement showing the basis upon which appellants contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of California herein.

I

Jurisdiction

The statute believed to sustain appellate jurisdiction is section 237(a) of the United States Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 62 Stat. 929), Title 28 U.S.C.A., section 1257.

II

The Statutes, the Validity of Which is Involved

The statutes of the State of California, the validity of which is involved, are Chapters 395 and 396 of the California 1951 Statutes, entitled, respectively, "AN ACT to repeal Section 491 of, and to add new Section 491 to, the Government Code, relating to the division of the State into assembly districts," and "AN ACT to repeal Section 470 of, and to add new Section 470 to the Government Code relating to the division of the State into congressional districts." (California Statutes 1951, Ch. 395, pages 1305-1359, Ch. 396, pages 1360-1361.)

Chapter 395, California Statutes 1951, is of great length, comprising about fifty-five printed pages. It provides for the division, or redistricting, of the State into 80 State assembly districts, the boundaries of which are delineated in detail. Chapter 396 of said Statutes provides for the division, or redistricting, of the State into 30 congressional districts. Thirty-one (31) of said assembly districts, and twelve (12) of said congressional districts were, by said Chapters 395 and 396, carved out of the territory and population of Los Angeles County, California.

III

The Nature of the Case

Petitioners and appellants instituted the present action as an original proceeding for mandamus in the Supreme Court of the State of California to compel the respondent, as Secretary of State of the State of California, to disregard said reapportionment Acts (Chapters 395 and 396 of the California 1951 Statutes) in the noticing, calling, and holding of the Presidential primary and general elections of 1952. The constitutional validity of said Chapters 395 and 396 is challenged in the petition for mandate, on the grounds: (1) that the provisions of said Acts violate and are contrary to the provisions of sections 6 and 27, Article IV, of the California Constitution; and (2) that the provisions of said Acts violate the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States forbidding a State to make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or to deny any person within its jurisdiction the equal protection of the law.

The petitioners and appellants allege that they are citizens of the United States, and citizens and residents of the State of California; that they are registered voters in the counties where they reside; that certain of them reside in assembly districts and congressional districts in Los Angeles County created by said Chapters 395 and 396; that in Los Angeles County 31 assembly districts and 12 congressional districts were created by said Chapters; that the assembly districts in Los Angeles County vary in population from 110,116 to 168,902, and the congressional districts vary in population from 228,712 to 451,322; that like inequalities of population exist in other specified counties in the State; that such inequalities of population are

prohibited by and violate the provisions of sections 6 and 27, Article IV, of the California Constitution and also violate the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States; that, in particular, Chapter 396 abridges the privileges and immunities of the citizens of certain specified congressional districts in Los Angeles County, in that they are not granted, upon the same terms and conditions of equality of representation, the voting rights and strength granted by said Chapter 396 to the citizens of other congressional districts in said County; that by reason of said inequalities in voting strength petitioners are denied equal representation in the House of Representatives in violation of their rights under the Federal Constitution. Petitioners thus challenge the constitutionality of Chapters 395 and 396 as being repugnant to the Constitution of the United States and thereby present a reviewable question.

IV

Substantial Questions Are Involved

The foregoing topic containing a statement of the nature of the case discloses that substantial questions are raised involving an application of section 1 of the Fourteenth Amendment to the Constitution of the United States. This is true not alone because of the divergencies of the population among the several districts but in the failure to apply the provisions of Sections 6 and 27 of Article IV of the Constitution of the State of California requiring contiguity and compactness in assembly and congressional districts of the counties of the class of Los Angeles. The petition for mandate contains maps and other data showing a failure to observe these provisions by the State court.

V

Assignment of Errors

The petitioners and appellants, Glenn M. Anderson, Lyle Cook, Jack Goldberger, Elinor R. Heller, June B. Joyner, S. A. Masterson, Julia Porter, Ned Redding, James Roosevelt, and Lee Sanders, assign the following errors in the record and proceedings in the above-entitled action:

1. That in said original proceeding there was drawn in question the validity of a statute of the State of California, being Chapter 395 of the California 1951 Statutes, "relating to the division of the State into assembly districts," upon the ground that said statute violates section 1 of the Fourteenth Amendment to the Constitution of the United States of America, in that said statute deprives the petitioners, and many other citizens of the State of California, of equal protection under the law, and abridges their privileges and immunities, contrary to the provisions of said Fourteenth Amendment, and the decision of the Supreme Court of the State of California, said Court being the highest court of the State of California in which a decision could be had in the suit, and said Court having entered an order denying petitioners' petition for a writ of mandate, and was in favor of the validity of said statute, said decision is hereby assigned as error.

2. That in said original proceeding there was drawn in question the validity of a statute of the State of California, being Chapter 396 of the California 1951 Statutes, "relating to the division of the State into congressional districts," upon the ground that said statute violates section 1 of the Fourteenth Amendment to the Constitution of the United States of America, in that said statute deprives the petitioners, and many other citizens of the State of California, of equal protection under the law, and abridges

their privileges and immunities, contrary to the provisions of said Fourteenth Amendment, and the decision of the Supreme Court of the State of California, said Court being the highest court of the State of California in which a decision could be had in the suit, and said Court having entered an order denying petitioners' petition for a writ of mandate, and was in favor of the validity of said statute, said decision is hereby assigned as error.

3. That the said Supreme Court of the State of California, by reason of said decision, has in effect held that the Legislature of said State may lawfully create 31 state assembly districts in Los Angeles County, State of California, varying in population from 110,116 persons to 168,902 persons and not composed of contiguous territories, contrary to the provisions of Article IV, Section 6, of the California Constitution requiring equality of population in such districts as nearly as may be, and contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting a State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which shall deny to any person within its jurisdiction the equal protection of the law, which said decisions are hereby assigned as error.

4. That the said Supreme Court of the State of California, by reason of said decision, has in effect held that the Legislature of said State may lawfully create 12 congressional districts in Los Angeles County, State of California, varying in population from 228,712 persons to 451,322 persons and not composed of compact contiguous assembly districts or territories, contrary to the provisions of Article IV, Section 27, of the California Constitution, and contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting a State from making or enforcing any law which shall abridge the

privileges or immunities of citizens of the United States, or which shall deny to any person within its jurisdiction the equal protection of the law, which said decision is hereby assigned as error.

VI

Cases Sustaining Jurisdiction

Where a state court entertained the question as to whether a state statute was repugnant to the Constitution of the United States and held that such statute was not repugnant and that it was valid, the United States Supreme Court has jurisdiction to review the decision of the state court.

Standard Oil Co. of Calif. v. *Johnson,* 316 U. S. 481, 62 S. Ct. 1168;

People ex rel Bryant v. *Zimmerman,* 278 U. S. 63, 49 S. Ct. 61;

Green Bay etc. Co. v. *Patten Paper Co.,* 172 U. S. 592, 37 S. Ct. 462;

Whitney v. *California,* 274 U. S. 357, 47 S. Ct. 641.

VII

Manner in Which Federal Question was Raised

The federal questions in this case were raised at the outset and were urged throughout the entire proceeding in the state Court. The proceeding was started by filing in the Supreme Court of the State of California a "Petition for Writ of Mandate." Said petition alleged that the statutory provisions involved were null and void because they denied to appellants the equal protection of the law and abridged their privileges and immunities in violation of the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

VIII

Appeal Timely Taken

The judgment and decision of the Supreme Court of the State of California denying the writ of mandate was entered on the 15th day of November, 1951. A petition for a rehearing was filed in said Court within the time required by law, and was denied by said Court on the 13th day of December, 1951. Said judgment is a final judgment. (Rule 24 (a) of Rules on Appeal.)

IX

Judgment of the Highest Court

The judgment rendered by the Supreme Court of the State of California on the 15th day of November, 1951, is that of the highest court of the State of California in which a decision could be had.

X

Opinions of Lower Court

The Supreme Court of the State of California did not file a written opinion in this case, or assign any reason, or reasons, for its decision.

Wherefore, it is respectfully submitted that the appeal of the above-entitled cause comes within the proper jurisdiction of the Supreme Court of the United States.

Dated this 23d day of January, 1952.

JOHN W. PRESTON,
JOHN W. PRESTON, JR.,
By JOHN W. PRESTON.

19

Office - Supreme Court, U. S.
FILED
MAR 6 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 635

GLENN M. ANDERSON, LYLE COOK, JACK GOLDBERGER, ELINOR R. HELLER, JUNE B. JOYNER, [illegible] A. MASTERSON, JULIA PORTER, NED REDDING, JAMES ROOSEVELT, AND LEE SANDERS,

Appellants,

vs.

FRANK M. JORDAN, AS SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 635

GLENN M. ANDERSON, LYLE COOK, JACK GOLDBERGER, ELINOR R. HELLER, JUNE B. JOYNER, S. A. MASTERSON, JULIA PORTER, NED REDDING, JAMES ROOSEVELT, AND LEE SANDERS,

Petitioners-Appellants,

vs.

FRANK M. JORDAN, AS SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Respondent-Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellee in the above-entitled cause moves the Supreme Court of the United States to dismiss this appeal or to affirm the judgment below, upon the following grounds:

1. This Court is without jurisdiction, because the record and the certificate of the Chief Justice of the California Supreme Court do not show that the decision of a Federal

question was necessary to the judgment of the state court (there being an adequate, independent non-Federal basis for the judgment).

2. This Court is without jurisdiction, because the Federal question is political.

3. The Federal question is not substantial, being of a non-justiciable, political character.

I. Statement of the Case

At its 1951 regular session the California Legislature adopted Chapter 395, Statutes of 1951, revising territorial districts for the election of members of the Assembly, the lower house of the California Legislature. Article IV, section 6, of the California Constitution (see Appendix) directs that this shall be done at the first regular session following each decennial Federal census.

During the past decennial period, California has been represented by 23 members in the Federal House of Representatives. Following the 1950 census the number of California seats was increased from 23 to 30 for the purpose of the 83d (1953) and subsequent Congresses (2 U.S.C.A. sec. 2a; Message from the President to Congress, submitted January 9, 1951). Consequently the 1951 session of the California Legislature adopted Chapter 396, Statutes of 1951, dividing the state into 30 congressional districts.

Appellants filed an original mandamus action in the Supreme Court of California, contending that Chapters 395 and 396 were invalid and seeking to restrain the appellee Jordan, Secretary of State, from following these statutes in the conduct of the 1951 presidential (sic) primary and general elections in California. The presidential primary and the direct primary elections will take place in California on June 3, 1952. The general election will occur on November 4, 1952.

The Attorney General of California, as counsel for the Secretary of State, filed a Memorandum of Points and Authorities with the state court opposing issuance of the writ, but did not plead to the petition. On November 15, 1951, the California Supreme Court filed its order denying appellants' petition. No opinion was filed. On December 13, 1951, appellants' request for a rehearing was denied.

Nominees for Congress and the State Assembly are elected at the direct primary election in California, not at the presidential primary. These two elections, although held on the same day, are separate and distinct. In the course of the state court proceeding, we called attention to the fact that the petitioners (appellants herein) sought the restraint with reference to the presidential primary election, and not as to the direct primary (Respondent's Points and Authorities, p. 2). We regard appellants' prayer for relief as directed in part at a technically erroneous objective. This technical aspect of the case was not settled prior to the presentation of this appeal to the Federal Supreme Court.

II. Decision of Federal Question Was Not Necessary Ground of State Court's Decision

The appellate jurisdiction of the United States Supreme Court will not extend to review a state court decision which rests on independent and adequate nonfederal grounds, notwithstanding that a Federal question was raised and decided (28 U.S.C.A., sec. 1257; *Fox Film Corp.* v. *Muller*, 296 U.S. 207; *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590). Appellants must show affirmatively that the state court's judgment rested on a necessary Federal ground (*Williams* v. *Kaiser*, 323 U.S. 471, 477; *Lynch* v. *New York*, 293 U.S. 52, 54). When a certificate is relied upon, it must inform the Federal Supreme Court that the decision of the Federal question was essential (*Hammer-*

stein v. *Superior Court*, 341 U.S. 491, 492; see also *Dixon* v. *Duffy*, —— U.S. ——, 72 S. Ct. 10).

The Supreme Court of California filed no opinion in this case. In order to demonstrate that the decision was based on a necessary Federal question appellants must depend entirely on the certificate of the Chief Justice of the state court, which certificate is on file herein. Careful attention is invited to the language of the certificate. It states that a described question arising under section 1 of the 14th Amendment "was considered and passed upon."

This certificate fails completely to indicate that the decision of the federal question was necessary or essential to the judgment. It does not indicate that an independent nonfederal question, adequate in itself to support the court's action, was not also considered and passed upon. It leaves the door wide open for the inference that such an independent, adequate nonfederal ground exists. A statement or certificate to the effect that the California court likewise considered and passed upon independent and adequate state questions would in no way be inconsistent with the certificate presented by appellants.

In California the State Supreme Court and the intermediate appellate courts possess concurrent jurisdiction with the superior courts in the issuance of the prerogative writs. The issuance of a writ of mandate is a matter for the discretion of the court to which the petition is addressed. The writ is not granted as a matter of strick legal right, but is based on a consideration of its effect in promoting justice (*Sipper* v. *Urban*, 22 Cal. 2d 138, 137 P. 2d 425; *Irvine* v. *Gibson*, 19 Cal. 2d 14, 118 P. 2d 812; *Betty* v. *Superior Court*, 18 Cal. 2d 619, 116 P. 2d 947). When the granting of the writ is likely to result in public detriment, the court is warranted in denying it (*Ferenz* v. *Superior Court*, 53 C. A. 2d 639, 643, 128 P. 2d 48, citing 34 Am. Jur. 830). Obviously,

the exercise of this discretion, one way or the other, involves a decision of a nonfederal nature (*Hammerstein* v. *Superior Court, supra; Fullerton* v. *Texas,* 196 U. S. 192).

Appellants urged upon the State Supreme Court arguments designed to persuade the court that this was a proper case for the exercise of its discretionary powers (Petition for Writ of Mandate, par. XIV; Petitioners' Points and Authorities, part IV). Similarly, this appellee urged upon the state court that the consequences of the writ would be worse than the alleged wrongs; that the issuance of the writ would be productive of chaos in the 1952 congressional and legislative elections in California (Respondent's Points and Authorities, part VII). There is nothing in the record, and nothing in the certificate, to indicate that the discretionary exercise of the court's power was not the chief, or at least a coequal, factor in the denial of appellants' petition. If, despite the certificate or other showing appearing from the record, it nevertheless appears that the nonfederal ground would have been sufficient to support the judgment, the case must be dismissed for lack of certainty as to which ground was controlling (*Lynch* v. *New York, supra; Johnson* v. *Risk,* 137 U. S. 300). The certificate on file herein completely fails to show that the federal ground was controlling. A cursory glance discloses its utter failure to demonstrate the essentiality of the federal question.

Under settled principles of California law, the State Supreme Court's denial of the writ, without opinion, does not constitute a judgment on the merits. It is not *res adjudicata* of the matters embodied in the petition. So far as the record is concerned—and the deficiency is not supplied by the certificate—it constituted simply a refusal by the State Supreme Court to exercise its jurisdiction (*Funeral Directors' Association* v. *Board of Funeral Directors,* 22 Cal. 2d 104, 136 P. 2d 785). A certificate that a federal question

was raised and decided does not confer appellate jurisdiction upon this Court, in the face of a reasonable inference that the state court may have denied relief in the exercise of its discretion (*Fullerton v. Texas, supra*).

The certificate her is very much like the ones presented in *Charlestown Federal Savings and Loan Assn.* v. *Alderson,* 324 U. S. 182, and *Fullerton* v. *Texas, supra,* in which cases the appeals were dismissed. Its nakedness becomes all the more apparent when it is contrasted with other certificates upon the basis of which this Court has assumed jurisdiction. (See, for example, the certificate in *Cincinnati etc. Packet Co.* v. *Bay,* 200 U. S. 179, where the certificate stated that "it became material" to decide the federal question in order to decide the case.) Under the circumstances here—where federal and nonfederal questions were raised and where the state court delivered no opinion—the Supreme Court automatically presumes that the decision is based upon an adequate, nonfederal ground raised in the record and will not take jurisdiction (*Lynch* v. *New York, supra*). The certificate herein, emanating from the Chief Justice of the state court rather than from the court itself, may serve to interpret ambiguous evidence in the record but not to supply deficiencies therein (*Charlestown Federal Savings and Loan Assn.* v. *Alderson, supra*).

We have, here, more than a suggestion that the decision "may have" rested upon a determination of state law (*St. Louis etc. R. Co.* v. *McWhirter,* 229 U. S. 265). We are not asking this Court to speculate which of several grounds, federal or nonfederal, was the preponderant factor in the decision. Substantial nonfederal questions were raised by the parties. The certificate emanating from the state court in no way negatives these nonfederal questions as an independent basis of the decision. To the contrary, the certificate is "susceptible of the interpretation" that the decision

was based upon an independent state ground (*Hammerstein* v. *Superior Court, supra; Fullerton* v. *Texas, supra*). Nothing in the record, and nothing in the certificate, affirmatively discloses that the federal question was essential. Consequently, appellants have failed to make out a case within the appellate jurisdiction of the United States Supreme Court.

III. The Federal Question Is Not Justificiable

Aside from the lack of showing as to the essentiality of the federal question, that federal question is of a political nature, hence insubstantial and outside the appellate jurisdiction of this Court.

The federal question described in appellants' jurisdictional statement (pp. 3-4), is that Chapters 395 and 396, California Statutes of 1951, create inequality of population among certain congressional and assembly districts in the County of Los Angeles, thereby offending the equal protection clause and the privileges and immunities clause of the 14th Amendment.

As to Chapter 396, the congressional districting statute: Article I, section 4, of the federal Constitution makes congressional districting a function of the state legislatures, subject to control by the Federal Congress. There is at present no federal law requiring equality or approximate equality of population among congressional districts, the last requirement of this sort having expired with the reapportionment of 1911 (*Wood* v. *Broom*, 287 U. S. 1). Appellants seem to assume that the 14th Amendment may be used to fill the breach created by congressional inaction. Not so—at least according to the opinions of a substantial number of the justices of this Court. The following authorities support the contention we now make—that equality of congressional representation is a desideratum which the Constitution reposes in Congress alone; that a judicial at-

tack on this ground raises no justiciable controversy, the question being of a political nature:

Colgrove v. *Green*, 328 U. S. 549;
South v. *Peters*, 339 U. S. 276;
Wood v. *Broom*, *supra*;
Colgrove v. *Barrett*, 330 U. S. 804;
Cook v. *Fortson*, 68 F. Supp. 624 (appeal dismissed 329 U. S. 675).

See also:

McDougall v. *Green*, 335 U. S. 281;
Johnson v. *Stevenson*, 170 F. (2d) 108.

In *Colegrove* v. *Barrett*, *supra*, this Court granted a motion to dismiss an appeal from a federal district court decision for want of a substantial federal question, apparently on the grounds set forth in the leading opinion in *Colegrove* v. *Green*, *supra*. We submit that the present appeal should be dismissed for the same reasons.

It is true that the above-cited cases all arose from the lower federal courts. The principle which forecloses this Court from examining political questions applies not only to actions originating in the federal courts, but also to appeals from state courts (*Marshall* v. *Dye*, 231 U. S. 250; *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370).

As to Chapter 395, the statute districting the lower house of the California Legislature: If equable congressional representation is so completely a nonjudicial matter that the courts will not interfere, the same is all the more true of representation in the state legislatures. In *Turman* v. *Duckworth*, 68 F. Supp. 744, and *South* v. *Peters*, 89 F. Supp. 672, the doctrine of judicial nonintervention stated in *Colegrove* v. *Green*, *supra*, was the basis of a refusal by

the federal judiciary to interfere with state territorial divisions established for state election purposes—and the refusal was in each case confirmed by this Court (*Turman* v. *Duckworth*, 329 U. S. 675; *South* v. *Peters*, 339 U. S. 276).

An opposite viewpoint is expressed in the dissenting opinion in *Colegrove* v. *Green*, *supra*. In this motion to dismiss the appeal, we do not deem it appropriate or necessary to explore the divergence, or to discuss the wider public aspects of population distribution among representational districts. Suffice it to say here, that according to the above-cited authorities appellants have failed to present a justiciable federal question in this case. As in *Colegrove* v. *Barrett*, *supra*, the appeal should be dismissed for want of a substantial federal question.

Conclusion

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or, in the alternative, that the judgment of the Supreme Court of the State of California be affirmed.

Dated: February 26, 1952.

EDMUND G. BROWN,
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LEONARD M. FRIEDMAN,
Deputy Attorney General,
Counsel for Appellee.

APPENDIX

California Constitution, Article IV, section 6:

"For the purpose of choosing Members of the Legislature, the State shall be divided into 40 senatorial and 80 assembly districts to be called senatorial and assembly districts. Such districts shall be composed of contiguous territory, and assembly districts shall be as nearly equal in population as may be. Each senatorial district shall choose one Senator and each assembly district shall choose one Member of Assembly. The senatorial districts shall be numbered from 1 to 40, inclusive, in numerical order, and the assembly districts shall be numbered from 1 to 80 in the same order, commencing at the northern boundary of the State and ending at the southern boundary thereof. In the formation of assembly districts no county, or city and county, shall be divided, unless it contains sufficient population within itself to form two or more districts, and in the formation of senatorial districts no county, or city and county, shall be divided, nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any assembly or senatorial district. The census taken under the direction of the Congress of the United States in the year 1920, and every 10 years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first regular session following the adoption of this section and thereafter at the first regular session following each decennial federal census, adjust such districts, and reapportion the representation so as to preserve the assembly districts as nearly equal in population as may be; . . ."

California Constitution, Article IV, section 27:

"When a congressional district shall be composed of two or more counties, it shall not be separated by any county belonging to another district. No county, or city and county, shall be divided in forming a con-

gressional district so as to attach one portion of a county, or city and county, to another county, or city and county, except in cases where one county, or city and county, has more population than the ratio required for one or more Congressmen; but the Legislature may divide any county, or city and county, into as many congressional districts as it may be entitled to by law. Any county, or city and county, containing a population greater than the number required for one congressional district shall be formed into one or more congressional districts, according to the population thereof, and any residue, after forming such district or districts, shall be attached by compact adjoining assembly districts, to a contiguous county or counties, and form a congressional district. In dividing a county, or city and county, into congressional districts no assembly district shall be divided so as to form a part of more than one congressional district, and every such congressional district shall be composed of compact contiguous assembly districts."

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 635

GLENN M. ANDERSON, LYLE COOK, JACK GOLDBERGER, ELINOR R. HELLER, JUNE B. JOYNER, S. A. MASTERSON, JULIA PORTER, NED REDDING, JAMES ROOSEVELT, and LEE SANDERS,

Petitioners-Appellants,

vs.

FRANK M. JORDAN, as Secretary of State of the State of California,

Respondent-Appellee.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

Statement of the Case.

This is an original proceeding in mandamus. The writ was sought from the Supreme Court of California to compel the respondent Secretary of State to disregard the reapportionment Acts of 1951 (Chapters 395 and 396 of the California 1951 Statutes) in calling, noticing, and holding the Presidential primary and general elections to be held in California in 1952.

The petition for the writ directly challenges the validity of Chapters 395 and 396, *supra*, for repugnancy to the California and Federal Constitutions, in that each of said statutes abridges the immunities and privileges of petitioners as citizens of the United States and denies to them the equal protection of the law. (California Const., Art I, Secs. 11 and 21; Const. United States, Fourteenth Amend., Sec. 1.)

It is well settled that a direct challenge of the validity of a state statute for repugnancy to the Federal Constitution is sufficient.

Miller v. Schoene, 276 U. S. 272;
Darling v. Newport News, 249 U. S. 540.

The petition for the writ also alleges that Chapters 395 and 396 of the California 1951 Statutes violate other provisions of the California Constitution relating to the reapportionment of the State into State Assembly and Congressional Districts. The provisions thus violated are the following:

> "* * * the Legislature shall, at its first regular session following the adoption of this section and thereafter at the first regular session following each decennial Federal census, adjust such (Assembly) districts and reapportion the representation so as to preserve the Assembly districts as nearly equal in population as may be * * *" (Calif. Const., Art. IV, Sec. 6.)
>
> "Any county, or city and county, containing a population greater than the number required for one congressional district shall be formed into one or

more congressional districts, *according to the population thereof* * * *. In dividing a county, or city and county, into congressional districts no assembly district shall be divided so as to form a part of more than one congressional district, *and every such congressional district shall be composed of compact contiguous assembly districts.*" (Calif. Const., Art. IV, Sec. 27.) (Emphasis added.)

The petition for the writ alleges that the Constitutional guaranties of equality of population and compactness and contiguity of territory were violated by the Legislature in the enactment of Chapters 395 and 396 of the California 1951 Statutes, and especially in the redistricting of Los Angeles County into 31 State Assembly Districts and 12 Congressional Districts.

The California Supreme Court denied the writ of mandamus sought. That Court filed no opinion. This appeal followed.

Appellee's Contentions.

Appellee contends: (1) That the record and certificate of the Chief Justice of the California Supreme Court are insufficient to show that decision of a federal question was necessary to the judgment below; (2) that this Court is without jurisdiction, because the federal question decided is political; and (3) that the federal question decided is not substantial because, assertedly, it is of non-justiciable, political character. Appellee further suggests that denial of the writ of mandamus, under California law, is discretionary and that such a decision rests on independent non-federal grounds.

ARGUMENT.

I.

The Record and the Certificate of the Chief Justice of the California Supreme Court Show That a Substantial Federal Question Was Involved and Decided.

The certificate of the Chief Justice of the California Supreme Court states, in part:

> "* * * the question whether the California Redistricting or Reapportionment Acts of 1951 * * * are repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the laws, was considered and passed upon by this Court."

The certificate alone sufficiently shows that a substantial federal question was involved, "considered and passed upon" by the lower court. The words "passed upon" clearly imply judicial decision. (*Kennebec Housing Co. v. Barton*, 122 Me. 374, 120 Atl. 56, 57; *Fitzsimmons v. Richardson, Twigg & Co.*, 86 Vt. 229, 84 Atl. 811, 814.) That the federal question is substantial is shown by the language of the certificate that "the question whether (the two Acts) * * * are repugnant to the provisions of Section 1 of the Fourteenth Amendment * * * was considered and passed upon."

It is apparent from the record that a substantial federal question was involved, considered and decided.

Where it is apparent that the validity of a State statute, as tested by the Constitution and laws of the United States, was necessarily involved and decided, the Supreme Court may review such decision on appeal.

Colorado Nat'l Bank v. Bedford, 310 U. S. 41, 60 S. Ct. 800;

Calif. Powder Works v. Davis, 151 U. S. 389, 393, 14 S. Ct. 350, 351;

Indiana v. Brand, 303 U. S. 95, 98, 58 S. Ct. 443, 445;

Owensboro Nat'l Bank v. Owensboro, 173 U. S. 664, 19 S. Ct. 537;

Clement Nat'l Bank v. Vermont, 231 U. S. 120, 34 S. Ct. 31;

Federal Land Bank v. Scrasland, 261 U. S. 374, 43 S. Ct. 385.

It should be noted here that if the State court decided that the two statutes were not violative of the immunities and privileges and equal protection of the laws clauses of the State Constitution, such decision necessarily involved decision that like provisions of the Federal Constitution were not violated by the provisions of said statutes. The two clauses appear in both Constitutions and are in scope and purpose the same.

Manford v. Smith, 40 Cal. App. 700, 701;

H. P. Welch Co. v. State, 89 N. H. 428, app. dismissed 306 U. S. 79;

New Haven etc. Co. v Danaher, 128 Conn. 213, 21 A. 2d 383;

Marion etc. Co. v. Stokes, 173 Tenn. 347, 117 S. W. 2d 740;

Scarborough v. Webb's Cut Rate Drug Co. (Fla.), 80 S. 2d 913.

Whether the State Court believed that the provisions of the State Constitution were violated by the two statutes does not specifically appear, nor is it material.

It is the duty of State courts, equally with Federal courts, to guard and enforce every right secured by the Federal Constitution.

Mooney v. Holohan, 294 U. S. 103;
Robb v. Connolly, 111 U. S. 624, 637.

This duty cannot be discharged by silently burying the constitutional guaranty without benefit of clergy.

If this Court should take the view that the record and certificate of the Chief Justice are insufficient to show the existence and decision of a substantial federal question, then appellants respectfully request that this cause be continued for a reasonable period so that counsel for appellants may, with all convenient speed, apply to the Chief Justice of the Supreme Court of California for a certificate or other judicial expression to more fully show whether the judgment herein rests on adequate and independent state grounds or whether decision of the federal question was necessary to the judgment rendered.

Hammerstein v. Superior Court, 340 U. S. 622;
Loftus v. People of Ill., 334 U. S. 804;
Indiana v. Brand, 303 U. S. 95;
Dixon v. Duffy, 96 L. Ed. Adv. Ops. 21, 72 S. Ct. 10.

Appellee's suggestion that the court below had discretion to deny mandamus, and that such a decision would involve no federal question cannot be maintained under the facts of this proceeding.

It is true that in some instances the California courts have discretion to deny mandamus, but this limited rule does not apply where the petitioner for the writ has no plain, speedy, and adequate remedy at law.

> "The writ (of mandate) *must* be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of the law." (Code Civ. Proc., Sec. 1086.) (Emphasis added.)

See also:

> *May v. Board of Directors,* 34 Cal. 2d 125, 133;
>
> *Betty v. Superior Court,* 18 Cal. 2d 619, 622.

The petition for the writ herein alleges that "Petitioners have no plain, speedy or adequate remedy at law," and states the reasons therefor. (See Pet., Par. XIII.)

II.

The Federal Question Involved and Necessarily Decided in This Case Is Substantial and Justiciable.

Little more need be said as to whether the federal question involved, considered, and decided herein is substantial. Nothing could be more important and substantial than the privileges and immunities of a citizen of the United States and his right to the equal protection of the laws. The right to vote, and to have that vote counted equally with every other vote cast in an election, lies at the very foundation of democratic government.

> "If the principle of equality is denied, the spirit, purpose and the very terms of the Constitution are emasculated." (*Stiglitz v. Schardien,* 239 Ky. 799, 40 S. W. 2d 315, 321.)

See also:

18 Am. Jur. 192;

2 A. L. R. (Annotation) 1337, and cases cited.

The principal question raised by appellee's motion to dismiss or affirm is whether the federal question involved in this case is justiciable.

Appellee's suggestion that the rights guaranteed by the Fourteenth Amendment are dormant because of Congressional inaction, that is, because of the failure of Congress to enact legislation requiring equality in Congressional representation, is no answer to the constitutional problem posed by this proceeding.

A citizen's right to the equal protection of the laws does not need either State or Federal legislation to give it validity. A citizen's right to the privileges and immunities granted to other citizens exists irrespective of State or Federal legislation. Such rights inhere in the Federal Constitution. Indeed, these constitutional rights cannot be increased or diminished by legislation; the latter must yield to the former when conflicts occur; and such rights must be guarded and enforced by all courts, whether or not required by legislation. (*Mooney v. Holohan, supra; Robb v. Connolly, supra.*)

Appellee asserts that the Federal question here involved is not justiciable, because it is political. He cites decisions of this Court to sustain his contention, namely:

Colegrove v. Green, 328 U. S. 549;

South v. Peters, 339 U. S. 276;

Wood v. Broom, 287 U. S. 1;

Colegrove v. Barrett, 330 U. S. 804;

Cook v. Fortson, 68 Fed. Supp. 624, Appeal dismissed 329 U. S. 675.

Although appellee refrains from any discussion of these decisions, it is necessary that they be considered and evaluated here. They should be discussed in their chronological order.

Wood v. Broom.

In *Wood v. Broom* (1932), 287 U. S. 1, the Court held that the requirements of compactness and contiguity of territory, and equality in population, found in the 1911 Congressional Reapportionment Act, were inapplicable, since that Act had expired by its own limitation. The majority of the Court held it to be unnecessary to pass upon the questions raised as to the right of the complainant to relief in equity, or as to the justiciability of the controversy. Four Justices were of opinion that the decree should be reversed and the bill dismissed for want of equity. Apparently, no constitutional question, such as those here involved, was raised or considered in the case.

Colegrove v. Green.

In *Colegrove v. Green* (1946), 328 U. S. 549, the complainants sought a decree declaring Illinois statutes apportioning the State into congressional districts invalid because such districts lacked compactness of territory and approximate equality of population. This Court affirmed the decree of the District Court of the United States dismissing the bill. Seven Justices of this Court participated in the consideration and decision of the case. Of the seven who participated, only three concurred outright; one concurred in the result; and three dissented. Mr. Justice Rutledge stated in his concurring opinion, by way of reservation:

> "Assuming that that decision (in *Smiley v. Holm*, 285 U. S. 355) is to stand, I think, with Mr. Justice

> Black, that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." (*Id.* p. 565.)

Thus four of the seven participating Justices were of the opinion that the issues of the case were justiciable.

It is apparent that the four Justices who concurred in the result did not consider the constitutional questions involved in the case at bar. The same four Justices believed that the bill should have been dismissed for want of equity.

In his dissenting opinion Mr. Justice Black gave consideration to at least one of the constitutional questions here raised, saying:

> "It is difficult for me to see why the 1901 State Apportionment Act does not deny petitioners the equal protection of the laws * * * The equal protection clause of the Fourteenth Amendment forbids such discrimination * * * No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote." (*Id.* p. 569.)

COLEGROVE V. BARRETT—SOUTH V. PETERS.

The memorandum decision in *Colegrove v. Barrett* (1947), 330 U. S. 804, adds nothing to *Colegrove v. Green,* and is of no value to our discussion.

The memorandum decision in *South v. Peters* (1950), 339 U. S. 276, is in the same category. At most these two memorandum decisions merely hold that Federal District Courts will not exercise their equity jurisdiction in cases posing political issues arising from a state's geographical distribution of electoral strength among its

political subdivisions. These two decisions do not touch the constitutional questions here involved.

COOK V. FORTSON.

In *Cook v. Fortson* (1946), 68 Fed. Supp. 624, appeal dismissed 329 U. S. 804, the Three-Judge Court held that equity would not intervene to enjoin compliance with County unit rule in selecting party nominee for Congress from a Georgia district, particularly since the State Executive Committee had refused to apply said rule.

SMILEY V. HOLM.

In view of the comment of Mr. Justice Rutledge, in his concurring opinion in *Colegrove v. Green,* upon the Court's decision in *Smiley v. Holm,* 285 U. S. 355, and the improper citation of the latter here and in other cases, we believe comment thereon to be necessary. In *Smiley v. Holm,* the question involved was whether a legislative enactment redistricting the State of Minnesota into congressional districts which was vetoed by the Governor and not repassed was valid. This Court held such enactment, not repassed after Governor's veto, was a nullity. This Court also held that, since the number of congressional representatives from Minnesota had been decreased by reapportionment and the Act was invalid, such representatives must be elected from the State at large until the State is redistricted. Nowhere in the decision does the Court refer to the constitutional questions involved in the case at bar, and it must be assumed, of course, that such questions were not considered.

From all of the foregoing it is clear that the issues in the present case are substantial and justiciable, and that the Court is not foreclosed by its former decisions to consider and decide such issues.

III.

This Court May Properly Declare Invalid a State Law Which Abridges the Constitutional Right of Citizens to Reasonable Equality of Voting Strength in the Election of Congressional Representatives.

Appellee asserts that the Federal question presented here is purely political, and that this Court will not, or cannot, consider such a question. The assertion is only a half truth, or less. Since the word "political" is referred to in some of the decisions of this Court pertaining to apportionment statutes, it is proper to state its meaning here.

The word "political" is defined in 72 C. J. S. 222 as follows:

> "In a generic sense, 'political' means of or pertaining to the exercise of the rights and privileges or the influence by which individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests which seek to control the appointment or action of those who manage the affairs of a state."

See also to same effect:

Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481;

State v. Civic Action Committee, 238 Iowa 851, 28 N. W. 2d 467;

Norton v. Letton, 271 Ky. 353, 111 S. W. 2d 1053.

The phrase "political rights" is defined in Webster's Int. Dict. (Second Ed.) as follows:

> "Those rights implying participation, either direct or indirect, in the establishment or administration of the government."

The right to vote is a political right, but the fact that it is political has not deterred this Court from considering and passing upon the right in many cases.

Smiley v. Holm, 285 U. S. 355;
Koening v. Flynn, 285 U. S. 375;
Carroll v. Becker, 285 U. S. 380;
Wood v. Broom, 287 U. S. 1;
Nixon v. Herndon, 273 U. S. 536, 540;
McPherson v. Blacker, 146 U. S. 1, 23, 24;
Coleman v. Miller, 307 U. S. 433.

In the sense here used, the term "political" embraces all rights granted by constitutions and laws necessary to the exercise of the elective franchise.

A citizen's right to vote, and to have his vote counted equally with the votes of other citizens, is of constitutional origin, buttressed by statute law.

The Federal Constitution provides that

> "The House of Representatives shall be composed of Members chosen every second year by the *people of the several States*" (Art. I, Sec. 2),

and that

> "Representatives * * * shall be apportioned among the several States which may be included within this Union, *according to their respective numbers* * * *" (Emphasis added.)

The Fourteenth Amendment also provides that

> "Representatives shall be apportioned among the several States *according to their respective numbers*,

counting the whole number of persons in each State * * *" (14th Amendment, Sec. 2.) (Emphasis added.)

No violence is done to these provisions of the Constitution by saying that they impliedly require reasonable equality in the voting strength of electors in voting, for congressional representatives.

In discussing the requirement of equality in voting Mr. Justice Black said in the dissenting opinion in *Colegrove v. Green*, 328 U. S. 370:

> "The purpose of this requirement is obvious: It is to make the votes of the citizens of the several States equally effective in the selection of members of Congress. It was intended to make illegal a nation-wide 'rotten borough' system as between the States. The policy behind it is broader than that. It prohibits as well Congressional 'rotten boroughs' within the States, such as the ones here involved. The policy is that which is laid down by all the Constitutional provisions regulating the election of members of the House of Representatives, including Article One which guarantees the right to vote and to have that vote effectively counted * * * a state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name. For legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, 'whether accomplished ingeniously or ingenuously.'" (Citing *Smith v. Texas*, 311 U. S. 128, 132; *Lane v. Wilson*, 307 U. S. 268.)

We do not understand that the opinion announced by Mr. Justice Frankfurter in the *Colegrove* case, ***supra,*** in any wise minimizes or condones the evils resulting from unequal voting strength, but that it rests upon the proposition, among others, that correction of the evil lies with Congress, or, in case Congress will not act, with the people. The opinion also suggests that "Courts ought not enter this political thicket." The policy embodied in the quoted phrase appears to have influenced the Court, more than any other, perhaps, in its decisions in respect to reapportionment legislation. But, is such a policy sound? Should the decision of the Court in cases involving constitutional rights be withheld merely because the Court will enter a political thicket in passing upon such rights? Should this Court await action by the Congress, or by the people, to correct an evil that is contrary to the spirit and, we believe, to the letter, of the Constitution?

Cogent reasons oppose the deferring of judicial action in cases involving constitutional rights which have been purposely and ruthlessly disregarded, or violated, by the legislative branch of the government. The people in their sovereign capacity seldom act until a public evil becomes a public scandal; and even then partisan, and other equally effective, influences delay, and sometimes actually prevent effective popular action. Not so with this Court. One of its chief functions, at least in historical practice, is to protect and defend the Constitution and every right guaranteed thereunder. This Court has power to act promptly and finally, undeterred by partisanship or other extraneous considerations, and the people look to it far more than the other branches of the government to protect their rights.

IV.

The Facts of This Proceeding Fully Justify a Review by This Court of the Judgment Below.

The record shows that Chapters 395 and 396 of the California 1951 Statutes do not operate uniformly throughout said State, because the citizens and electors in many of the state assembly and congressional districts are granted and will exercise much greater voting power in the election of assemblymen and congressmen than is given to the citizens and electors of other such districts. *This discrimination is in direct and wilful violation of the provisions of Article IV, Sections 6 and 27, of the California Constitution,* already quoted, *ante.*

The disparity mentioned is most pronounced in Los Angeles County, where the City of Los Angeles and its metropolitan area are located. Los Angeles County has a population of more than four million persons, nearly all of whom live in the coastal plain area south of the Sierra Madre range of mountains. No natural barriers exist in this area that would require or justify any appreciable disparity in population in apportioning some four million people between twelve congressional districts and thirty-one state assembly districts. Notwithstanding this fact, the Legislature's 1951 reapportionment shows variances of population in congressional districts from a low of 228,712 in district No. 16 to a high of 451,322 in district No. 19. Other congressional districts show almost as great disparity in population. The variances in population of assembly districts run from a low of 110,116 to

a high of 168,902. [See Ex. "A" to petition for mandate for complete details of all congressional and assembly district populations in the County, and other counties of the State.]

The picture of discrimination would not be complete without also referring to the lack of compactness and contiguity of such districts. The maps attached to the petition for mandate complete the picture of wilful discrimination. [See Exs. "B" to "L," incl.] The wandering, "shoe string" lines and fantastically shaped districts more clearly show the discrimination than mere words.

The large number of congressional and assembly districts thus shown to be grossly unequal in population, together with the irregular areas thereof, manifest a legislative purpose to disregard the constitutional mandates that such "districts shall be as nearly equal in population as may be" (Calif. Const., Art. IV, Sec. 6) and "every such congressional district shall be composed of compact contiguous assembly districts." (*Id.* Sec. 27.)

One question presented in the instant case was not presented or considered, apparently, in the several apportionment cases heretofore decided by this Court: that is, whether a State Legislature may deny its citizens rights specifically granted them by the State Constitution. If this may be done with impunity, then the constitutional limitations upon legislative abuse of the people's rights will soon disappear. And it may be asked, who shall prevent such abuse, if this Court refuses to exercise its power under the Federal Constitution to declare invalid any state legislation denying to citizens of the United States the equal protection of the laws, or abridging their privileges and immunities?

Conclusion.

In view of the foregoing, this Court would be fully justified in reviewing, and should review, the decision of the lower court. This is true, even if it involves reconsideration of *Colegrove v. Green* and other cases relied on by appellee.

The reversal of the judgment below would work no hardship upon the people of Los Angeles County, or upon the people of California. If Chapters 395 and 396 were declared invalid, representatives in Congress may be elected by the State at large.

Fed. Const., Art. I, Sec. 2;
2 U. S. C. A., Sec. 2a(c)(2);
Smiley v. Holm, 285 U. S. 355.

Moreover, a review by this Court will have other salutary effects, and especially if the end result should be declaring any unreasonable variance in the populations of congressional districts invalid. One such decision by this Court would probably be sufficient to cause reforms of such abuses, and would prevent future violations of the right of every citizen to vote equally with other citizens and to have that vote effectively counted.

Respectfully submitted,

JOHN W. PRESTON,
Counsel for Appellants.